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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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Pursuant to Rule 22.5 of the Supreme Court Rules, the National Association of Regulatory Utility Commissioners (NARUC), petitioner herein, hereby submits its brief in reply to arguments presented by the federal respondents in opposition to the NARUC's petition for a writ of certiorari.[1]

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[1] Since the arguments raised by respondents Private Truck Council of America, Inc., and Private Carrier Conference, Inc. *et al.* in opposition to the NARUC's petition are similar to those presented by the federal respondents, we will reply herein primarily to the federal brief in opposition.

ARGUMENT

Petitioner NARUC, in presenting the reasons why its petition for writ of certiorari should be granted, stressed the crucial importance of this case to the motor carrier enforcement programs of the several States. If left undisturbed, the decision of the Eleventh Circuit affirming the new "policy statement" of the Interstate Commerce Commission (ICC or the Commission) will render such enforcement efforts extremely difficult, if not impossible, for State enforcement agencies to perform because the Commission's decision effectively destroys the practical distinction between for-hire and private carriage upon which State motor carrier enforcement is based. (NARUC Pet. 10-13).

In response, the federal respondents criticize the NARUC's argument that the Commission's new single-source leasing policy unlawfully blurs the legal distinction between private and for-hire carriage as "unfounded", based upon "the exaggerated nature of NARUC's fears". (Fed. Br. 14-15).[2] In effect, these parties argue that the NARUC's arguments are premature, and that therefore, the Court should not now be concerned whether, in the words of *Drum*,[3] the ICC's policy "impose[s] practical limitations upon unregulated competition . . . in a manner which transcends the merely formal". 368 U.S. at 375. In their request that this Court await "actual enforcement cases" to determine if "the new policy will work in practice" (Fed. Br. 15), the federal respondents downplay the sweeping nature of the ICC policy statement, as well as ignore this Court's holding in *Drum*.

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[2] Similarly, respondent Private Truck Council of America, Inc. characterizes the NARUC's concerns as "fanciful". (PTCA Br. 15, n. 11).

[3] *United States v. Drum*, 368 U.S. 370 (1962).

A. Enforcement of the ICC's Single Source Leasing Policy

In its petition, the NARUC argued that the ICC's failure to require written single source leases would fundamentally frustrate State motor carrier enforcement because a State enforcement officer would not necessarily be provided with written evidence that the driver of a leased vehicle is entitled to the presumption [4] of private carriage for complying with the ICC's "sample lease language." (NARUC Pet. 11-13). We do not intend to repeat the arguments contained in our petition on this point, except to note that in our petition, we never argued that "oral single source leases will automatically raise the presumption of legitimate private carriage" (Fed. Br. 14). Rather, we argued that by the terms of the Commission's policy, a carrier is entitled to the presumption of private carriage, whether or not a written lease exists, as long as the six minimum criteria are present. Since the ICC policy statement places the burden of rebutting the presumption of private carriage upon, *inter alia*, State enforcement officers, *whether or not a written lease exists*, the arguments of the federal respondents that the NARUC's fears are "exaggerated" clearly misstates the ICC's policy.

The federal respondents concede as much when they state that "it would be virtually impossible to make such a showing [compliance with the six leasing criteria] at a road check without a written lease." (Fed. Br. 15) Yet, by its terms, the ICC's policy statement does not

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[4] The federal respondents appear confused concerning the presumption created through compliance with the ICC's six minimum lease criteria. By the terms of the policy statement, compliance with these criteria "raises a rebuttable presumption of private carriage." NARUC App. 57b. In their brief, however, federal respondents assert that compliance with the minimum criteria "will now create a presumption in favor of for-hire carriage." (Fed. Br. 18). Presumably, the presumption in favor of private carriage is correct.

permit a State officer to rely on the absence of a written lease to rebut a driver's claim that the six minimum criteria are present. Indeed, nowhere in the policy statement does the ICC state that failure to provide the "best evidence of the minimum requirements" (a written lease) rebuts this presumption. (NARUC App. 37b-38b). Therefore, the ICC's policy statement is not flawed because "it would require state enforcement authorities to prove violations of law" (Fed. Br. 14); rather, it is flawed because, in the absence of a written lease requirement, the new policy makes it "virtually impossible" for State officers to prove such violations.

A recent action by the ICC in which the Commission *has* required "truck drivers to prove that they are *not* law breakers" (Fed. Br. 14, emphasis in original) makes this flaw apparent. On March 14, 1984, in Ex Parte No. MC-43 (Sub-12), *Leasing Rules Modifications*, 49 Fed. Reg. 9570-9571 (March 14, 1984), the Commission issued final regulations which, *inter alia*, allow private carriers to trip lease their equipment and drivers to for-hire carriers. In those regulations, which are set out in the margin,[5] the Commission quite forcefully requires

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[5] 49 U.S.C. sec. 1057.22 Exemption for private carrier trip leasing and trip leasing between authorized carriers.

Regardless of the leasing regulations set forth in this part, an authorized carrier may lease equipment to or from another authorized carrier, or a private carrier may lease equipment to an authorized carrier under the following conditions:

(a) The identification of equipment requirements in sec. 1057.11(c) must be complied with;

(b) The lessor must own the equipment or hold it under a lease of 30 days or more;

(c) There must be a written agreement between the authorized carriers or between the private carrier and authorized carrier, as the case may be, concerning the equipment as follows:

(1) It must be signed by the parties or their authorized representatives.

(2) It must provide that control and responsibility for the operation of the equipment shall be of the lessee from the time

that drivers operating under such trip leases be able to prove lawful motor carriage: such leases must be in writing, and a copy of the agreement "must be carried in the equipment." 49 C.F.R. sec. 1057.22(c). A failure to comply with these requirements constitutes a violation of the Commission's regulations and a finding of unlawful carriage. The contrast between these rules and the Commission's single source leasing policy could not be starker. Clearly, the Commission knows how to write an enforceable leasing rule applicable to for-hire carriage. In its single source leasing statement, it has declined to adopt such an enforceable policy for private carriage.

B. The Requirements of *Drum*

Despite the obvious infirmities contained within the ICC's single source leasing policy, the federal defendants assert that the question of the enforceability of the policy should await "actual enforcement cases" before being judged. (Fed. Br. 15). We submit that this request should be rejected for the basic reasons described in our petition: the ICC's single-source leasing policy fails to comply with the holding of *Drum*, *supra*, that the legal distinction between private and for-hire carriage "be interpreted in a manner which transcends the merely formal." 368 U.S. at 375 (NARUC Pet. 13-17). In essence, *Drum* stands for the proposition that the dis-

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possession is taken by the lessee and the receipt required under sec. 1057.11(b) is given to the lessor until: (i) possession of the equipment is returned to the lessor and the receipt required under sec. 1057.11(b) is received by the authorized carrier, or (ii) in the event that the agreement is between authorized carriers, possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment.

(3) A copy of the agreement must be carried in the equipment while it is in the possession of the lessee.

Sec. 1057.42 Lease of equipment by regulated carriers.

Authorized carriers may lease equipment and drivers from private carriers for periods of less than 30 days, in the manner set forth in 49 C.F.R. 1057.22.

tinction between private and for-hire carriage must be as a practical matter both workable and enforceable. As we have shown, the ICC's policy statement hardly qualifies in any real sense as practical guidelines for the enforcement of the heretofore "bright line" between these two types of carriage.[6] Therefore, we respectfully submit that there is no need to await "actual enforcement cases" given the inherent flaws in the new leasing policy. Indeed, this Court should review this policy now, before it takes effect, in order to avoid the chaotic enforcement of federal law which the Commission's decision portends.

CONCLUSION

For all of the reasons set forth in its petition and herein, the NARUC prays that a writ of certiorari be issued to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[6] The federal respondents appear to concede as much when they note that "it would be virtually impossible to make such a showing [of lawful private carriage] at a road check without a written lease" (Fed. Br. at 15) in light of the failure of the policy statement to require such documentation.